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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 699

J. W. SWENT and URSULA L. SWENT
(husband and wife),
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Fourth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Fourth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners, husband and wife, both native born as citizens of the United States in the State of California, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit filed and entered therein May

8, 1946, in a case between the above-named parties docketed under the number 5449. The said judgment on review reversed a judgment of the Tax Court of the United States promulgated May 14, 1945, which found and determined that petitioners here (also petitioners in the Tax Court) were *bona fide* nonresidents of the United States for more than six months during the year 1940 and were entitled to exclude from income taxable by the United States an amount of $25,000 received for services as mining engineer rendered in Mexico. A petition for rehearing was denied by the said Circuit Court June 18, 1946, and thereafter on September 10, 1946, an order was made by the Honorable Chief Justice extending to November 16, 1946, the time to file in this Court a petition for certiorari.

OPINIONS BELOW.

That of the Circuit Court of Appeals is printed in the record. (Tr. p. 56 et seq.) The opinion of the Tax Court, which was reviewed *in banc,* is reported in 5 T. C. 33 and is reprinted as an appendix to the brief submitted in support of this petition.

JURISDICTION.

This Court has jurisdiction to review the judgment in question under U.S.C.A. Title 28, paragraph 347. This application is made within the time allowed by law, extended by order as above stated.

QUESTIONS PRESENTED.

Jurisdiction to review the decision of the Tax Court, rendered after a hearing at San Francisco, California, upon facts involving Mexico and various of our western states, fell, at the option of the Commissioner and his counsel, to the Fourth Circuit for the reason that petitioners, forwarding their income tax returns from Mexico, were required under the regulations to file them in the office of the collector at Baltimore, Maryland, situate within the confines of that circuit. Decision of that Court, reversing the judgment of the Tax Court in favor of the taxpayers, presents the following questions:

1. Whether the residence or nonresidence of petitioners in the United States, and its *bona fides* in 1940, was a question of fact, or, as the Circuit Court held, a question of law.

2. Whether an appellate court, reviewing a decision of the Tax Court, may curtail the principle of the *Dobson* case by the arbitrary premise that the question presented is one of law and not one of fact, and thereby overthrow all probative as well as ultimate fact-findings of the Tax Court.

3. Whether the appellate court on review may substitute as the basis of its decision, its own findings of fact, directly antithetical to those of the Tax Court, having as the record before it only the findings and decision of the latter Court, and not the original record.

4. Whether or not the term "an individual citizen of the United States, a bona fide nonresident of the

United States for more than six months during the taxable year" (Revenue Act of 1938, Sec. 116) is to be applied according to the plain and unambiguous meaning of the words, or whether resort is to be had to extraneous sources to give color to an artificial and forced interpretation, nullifying the intent and effect of the legislation.

5. To what extent may an intermediate appellate court circumvent the principle of the *Dobson* case by making rulings *ex cathedra* as to what constitute questions of fact or, on the contrary, of law, and thereupon make its own nebulous and hypothetical findings of fact in contradictory form (reproduced in parallel columns Tr. pp. 71-73) to those of the Court of first instance.

STATEMENT OF THE CASE.

Petitioners, husband and wife, are both native born citizens of California. Being affianced, they were married in Mazatlan, Mexico, in 1915, whereabouts Swent *vir* was employed as a mining engineer. In 1918 he changed affiliation to San Luis Mining Company, a California corporation operating at the Pueblo of Tayoltita, State of Durango, where he shortly became superintendent, and has ever since continued in that capacity. They took residence in an adobe house, company property, supplied and retain their own furniture, and pay their own domestic service. The locality is on the northern border of the tropics and is unhealthful, from which both increasingly suffered

after twenty years of stay, and spent more lengthy leaves in the United States for recuperation.

The community property system prevails in California, domicile of origin of petitioners, as well as in Durango, Mexico (*Brittingham v. Commissioner,* 13 B.T.A. 375), and petitioners made their returns of income, first to the Sorting Division of the Bureau of Internal Revenue, and since 1935 to the collector at Baltimore, Maryland, according to regulations.

For the year 1940 petitioners returned and each paid to the United States income taxes in the amount of $2,544.94, based on bureau rulings later overruled. Claims for refund were duly filed and denied. The Commissioner assessed an additional tax on both parties and the issues were carried up on petition to the Tax Court, which found as a fact, review *in banc* included, that petitioners were bona fide nonresidents in 1940 and were entitled to refund.

The probative and the ultimate facts involved are stated at length in the opinion of the Tax Court (reprinted as appendix to brief) and are submitted by way of incorporation herein for the consideration of the Court, as being judicial and not *ex parte* statements—duplication and burdening of the record being avoided.

SPECIFICATION OF ERRORS.

In its decision and judgment in this cause the Circuit Court of Appeals for the Fourth Circuit erred in the following particulars:

1. In not adhering to the principle prescribed by this Court in *Dobson v. Commissioner,* 320 U. S. 489, and in numerous subsequent decisions affirming its rule, that an Appellate Court is precluded from reviewing facts found by the Tax Court when these are founded upon a rational basis, have warrant in the record and a *raison d'etre* in the law.

2. In holding, *ipsi dixerunt,* without precedent or authority, that the finding by the Tax Court that petitioners were bona fide nonresidents of the United States presented a question of law and not one of fact.

3. In interjecting into the application of Sec. 116, Revenue Act of 1938, extraneous sources of interpretation, whereas the terms of the statute, "bona fide nonresident of the United States", are plain and unambiguous.

4. In including as a decisive basis of construction of the statute the casual and vague comment uttered in debate by a single legislator.

5. In going contra to the rule that when a previous or pending statute is amended it was the intent to alter the meaning of the prior act or legislative proposal. The House bill provided for exclusion from tax of foreign income earned by a citizen "while actually employed outside the United States". The Senate substituted by way of criterion the less ambiguous term "bona fide nonresident". The majority opinion below states: "However, it seems evident that the Senate intended no change from the meaning of the House bill."

6. In imposing a narrow and restricted construction on Sec. 116 of the Revenue Act of 1938 (carried over with various amendments as Sec. 116 of the Revenue Code), and in not interpreting it as being a remedial statute, adopted to encourage American trade, commerce, undertakings and employments in foreign countries, and designed to relieve against double taxation on indivduals and enterprises so engaged.

7. In ignoring the significance of the term "bona fide" as applied to "residence" in the statute under interpretation.

REASONS FOR GRANTING THE WRIT.

The decision of the Court below is contrary to the rule laid down by this Court in the *Dobson* case and of those which have since reiterated it.

Uncorrected by this Court, the decision below would stand as a dangerous precedent for other encroachments on the integrity of the principle that findings of administrative tribunals on questions essentially factual may not be reversed on review.

The law in question involves a matter of national policy, adopted to promote our foreign trade and commerce, and business enterprise abroad, and to encourage our citizens in the conduct and management thereof.

The number of Americans residing in situations similar to that of petitioners here is legion, and all are

potentially affected. It was never the intent of Congress to relegate them to the status of perpetual exiles, or that they should be penalized by double taxation whenever considerations of bodily health require the spending of an interlude in the homeland.

In the entire field of administrative law it is requisite that there be more accurate delineation of the frontiers lying between questions of law and those essentially grounded in fact.

The majority decision of the Fourth Circuit Court is in conflict with the whole trend of decisions in other circuits, which are meticulously observing the rule in the *Dobson* case. Notable among these is the exposition given by L. Hand, C. J. of the Second, in *Kirschenbaum v. Commissioner,* 155 Fed. (2d) 23. Similar, in the Ninth, is *American Box Shook Assn. v. Commissioner,* 156 Fed. (2d) 629.

Wherefore it is prayed that this petition be granted and that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit, the which reverses the decision of the Tax Court in favor of petitioners here.

Dated, San Francisco, California,
November 11, 1946.

NATHAN MORAN,
Attorney for Petitioners.

GEORGE E. HAW,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Additional argument in favor of the petition may be greatly abridged if the Court will deem that there be incorporated herein the petition for rehearing filed in the Fourth Circuit by petitioners here, respondents below. This is printed as part of the transcript of the record, page 68 et seq., with a separate index and table of cases appearing at the beginning of the transcript.

In addition there is printed as an appendix hereto the findings and decision of the Tax Court, the which embody a thorough exposition of the evidence and of the points of law involved.

RESIDENCE IS A QUESTION OF FACT.

Whether to be determined by a Court or by a jury, residence, including its *bona fides,* is a question of fact.

Williams v. North Carolina, 317 U. S. 287, 291;
In re Vance, 92 Cal. 195, 198, 28 Pac. 229, 231;
In re Donovan, 104 Cal. 623, 625, 38 Pac. 456.

Bona fide residence is a question of ultimate fact, based on two underlying elements, also strictly factual, viz.: *first,* the actual place of abode and habitation of the individual in question, and *second,* his intention, in good faith, with respect to continuing or abandoning his *status quo,* i.e., his *animus manendi.*

The fact of residence, in any of its variations, is to be clearly distinguished from the legal consequences resulting in the way of rights and duties incidental

thereto, such as the privilege of voting, liability for taxes, and the legal fiction *mobilia sequuntur personam.*

When a question of fact is involved, its determination covers not only the ultimate fact to be found, but also the underlying probative facts.

Parker v. Industrial Insurance Dept. (Wash.), 172 Pac. 830, 831.

California has enacted in statutory form the common law and universally accepted rules for determining the fact of residence:

"*Residence, rules for determining.* Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose;

2. There can only be one residence;

3. A residence cannot be lost until another is gained;

4. The residence of the father during his life, and after his death, the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child;

5. The residence of the husband is the residence of the wife;

6. The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian;

7. The residence can be changed only by the union of act and intent."

Cal. Political Code, Sec. 52.

Webster's Dictionary of Synonyms, under the title of *bona fide,* gives the following as its synonyms:

Authentic, genuine, veritable, real, actual.

As antonyms it states:

Counterfeit, bogus, simulated, feigned, pretended.

The Tax Court found that the residence of petitioners in Mexico, begun in 1915, continued throughout 1940 to be genuine, real and actual. A majority of the Circuit Court for the Fourth Circuit finds by implication that in the latter year it in some manner became counterfeit, bogus, simulated, feigned, or pretended.

The fact that respondents Swent hired in San Francisco a succession of furnished apartments on a month-to-month basis, where they could be assured of accommodations on their visits to the States, and where they could occasionally reunite with their two student sons, is of no significance in view of the Supreme Court's pronouncement on the subject in the famed case involving the estate of Col. Green:

> "The retention of his apartment at the Sherry Netherlands Hotel in New York, upon temporary lease, and his occupation of it during the later years of his life for short stays when passing through New York on his way to and from Florida, are without weight to turn the scales against the preponderating evidence that his real home was in Massachusetts. From 1921 on the New York apartment furnished none of the physical aspects of a home, and evidence is wanting that the deceased ever regarded or treated it as such."
>
> *Texas v. Florida,* 306 U. S. 398, 427.

In the just-cited case the issue was one of domicile. But this is merely a question of residence with an added element of ultimateness and finality of intent, which still leaves it a question of fact. Mr. Justice Frankfurter in his dissenting opinion says:

> "The controlling assumption in taking jurisdiction in this case is that the ascertainment of a single domicile for Green is merely the determination of a fact." (Ibid. 431.)

The majority opinion in the case proceeds on the basis, as being so axiomatic as not to call for discussion, that residence is a question of fact, probative of domicile.

> "Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile. * * * While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there." * * *
>
> "In such circumstances the actual fact as to the place of residence and decedent's real attitude and intention with respect to it as disclosed by his entire course of conduct are the controlling factors in ascertaining his domicile." (Ibid. 424-5 *passim.*)

With respect to the claims of Florida that Col. Green had changed his domicile to that state, this Court held that the claimant had the burden of proof of abandonment of prior domicile in Massachusetts:

> "That burden is not sustained by showing a period of winter residence in obedience to the demands of health." (Ibid. 427.)

Wherefore petitioners submit that the Circuit Court of Appeals for the Fourth Circuit erred in its decision and that this petition for a writ of certiorari should be granted so that the decision below can be reversed and that of the Tax Court reinstated.

Dated, San Francisco, California,
November 11, 1946.

Respectfully submitted,
NATHAN MORAN,
Attorney for Petitioners.

GEORGE E. HAW,
Of Counsel.

(Appendix Follows.)

Appendix

5 T. C. No. 5

The Tax Court of the United States

J. W. Swent and Ursula L. Swent, Husband and Wife, Petitioners, v. Commissioner of Internal Revenue, Respondent.

Docket No. 4381 Promulgated May 14, 1945.

An American citizen who had resided in Mexico for many years, had carried on his business there, and had otherwise qualified as a nonresident of the United States, is not deprived of the exclusion from income granted by section 116(a) of the Revenue Act of 1938 by reason of having been absent from Mexico for more than 183 days during the taxable year. *Estate of W. M. L. Fiske,* 44 B.T.A. 227, followed notwithstanding reversal in 128 Fed. (2d) 487.

Nathan Moran, Esq., for the petitioners.

B. H. Neblett, Esq., for the respondent.

The respondent determined a deficiency of $147.48 in the income tax of each petitioner for the year 1940. Each petitioner also asserts an overpayment of $2,544.94 for that year.

The sole issue is whether or not the petitioner, James W. Swent, is entitled to exclude from his gross income amounts received from sources without the United States, as provided in section 116(a) of the Revenue Act of 1938.

Findings of Fact.

The petitioners are husband and wife, native citizens of the United States, and were born in the State of California. James W. Swent will generally be referred to as the petitioner. They filed their separate income tax returns for the taxable year, on the community property basis, with the collector of internal revenue at Baltimore, Maryland. Their address as stated in their returns was Tayoltita, Durango, Mexico. Prior to 1935 the petitioners filed their returns with the Sorting Section, Washington, D.C., and therein designated the same address.

The petitioner, James W. Swent, first went to Mexico in September, 1915, and was employed as an engineer by the Mexico Candelaria Company. At that time he was engaged to be married to the petitioner, Ursula L. Swent, who came to Mazatlan, Sinaloa, Mexico, where the petitioners were married. They then went to San Dimas, Durango, Mexico, where they "set up housekeeping". They lived there for about three years, when the petitioner, in March, 1918, was employed as a geologist by the San Luis Mining Company, a company engaged in mining gold and silver, and moved to Tayoltita. He became assistant manager of the company and about 1920 he became the manager, a position which he has held ever since. He and his family have resided in Tayoltita since 1918.

Tayoltita is a primitive mining town with about 1,500 inhabitants. It has no hotels or residences suitable or available for rent. The petitioners and their

family lived in an adobe house belonging to the company. It is a part of the petitioners' duties to entertain in their own home any company officials or other business guests. The petitioner owned the household furniture and paid the servants of the household.

The petitioners have two sons, age 27 and 22. Both were born in Oakland, California. Mrs. Swent taught them in Mexico through the grammar school grades. They then were sent to the United States for preparatory school and college training. The older son is now in the United States Navy.

Tayoltita is just inside the Tropic of Cancer. Its climate is very hot for seven or eight months of the year. Both petitioners have suffered from its climatic conditions. The petitioner had low blood pressure and his wife was anemic. Practically all of their visits to the United States in recent years have been on account of their health.

The Mexican Government requires the registration of its residents as a prerequisite to their entering a gainful occupation. In so registering, the petitioner declared himself to be a resident of Tayoltita, Durango. The petitioner's passports to the United States also stated that his place of residence was that village. He gave his address in the United States as 485 California Street, San Francisco, a business office.

The petitioner had an assistant manager and a staff of from 12 to 15 American and from 20 to 25 Mexican technical assistants. During the petitioner's absence

from Mexico, the mine was operated and managed by the assistant manager and the staff. In emergent matters arising occasionally, the petitioner received telegrams from his assistants relating to questions of policy, amounts of purchases, etc. With the exception of making decisions in such cases, the petitioner did nothing toward operating the San Luis Company Mines in Mexico.

In 1940 the petitioner received an annual salary of $25,000 from the San Luis Company. Approximately one-half of this amount was regularly placed to the petitioner's credit on the company's books in Mexico and the other half was deposited to his credit in a San Francisco bank. He drew from his account in Mexico as he needed funds. During 1940 the petitioner's salary from the San Luis Company was continued undiminished for any deduction for time spent out of Mexico.

During 1940 the petitioners each spent a total of 241 days, comprising four visits, in the United States. Mrs. Swent always accompanied her husband on his trips to this country. In each of the years 1939, 1942, and 1943 the petitioners were in the United States over six months. While in San Francisco the petitioner rented a furnished apartment, on a month-to-month basis, in an apartment house at 2222 Hyde Street. On his various trips he did not occupy the same apartment. The apartment was also used as headquarters for the petitioners' sons while attending school in California.

In 1940 the petitioner served as a consultant in litigation involving apex rights on a mine in Idaho. Intermittently he devoted several months during the period of a year and a half to such work, for which he received a fee of $10,000 in that year. He also was employed for about six months in 1940 as an expert in a depletion case in New Mexico. He received $4,000 for such services. He included both sums in his income tax return for 1940. The San Luis Company had no connection with either employment.

The domicile of origin and the last domicile of each of petitioners prior to their going to Mexico was the State of California, and the community property law of the State of Durango, Republic of Mexico, in which the petitioners have resided, is substantially the same as the community property law of the State of California.

The Civil Code of California, section 156, provides that the husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

The Civil Code of the State of Durango, Mexico, Article 188, provides that the wife is obligated to follow her husband if he so requires wherever he establishes his residence except when it is agreed to the contrary in a marriage contract. Even though it be not so agreed the courts for good cause may exempt the wife from this obligation when the husband transfers his residence to a foreign country.

The petitioner is still manager of the San Luis Company and expects to continue his activities as

such. He intends to retain his residence in Tayoltita. The company is expanding and contemplates enlarging its mill. The petitioner is also president of a manganese company which has just completed a mill in Lower California. He is a director of the International Bank in Mexico City. During the year 1940 the petitioners were bona fide non-residents of the United States.

The $25,000 salary received by the petitioner from the San Luis Company in 1940 was earned income from a source without the United States and would have constituted earned income as defined in section 25(a), I.R.C., if it had been received from a source within the United States.

Opinion.

Van Fossan, *Judge:* The respondent bases his objection to the exclusion from the petitioner's gross income of the $25,000 salary received from the San Luis Company, as provided by section 116(a) of the Revenue Act of 1938,[1] on the narrow ground that the

[1]Sec. 116. Exclusions From Gross Income.

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) Earned Income from Sources Without United States.—In the case of an individual citizen of the United States, a bona fide non-resident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

petitioner was physically within the United States for a period of more than six months during the taxable year, "regardless of the fact that he previously resided in Mexico and intended to return there." He relies wholly on *Commissioner v. Fiske's Estate,* 128 Fed. (2d) 487, certiorari denied, 317 U.S. 635, reversing 44 B.T.A. 227. A careful examination of the decision in that case leads us to the conclusion that the Circuit Court of Appeals for the Seventh Circuit reversed the Board chiefly on the ground that the taxpayer failed to prove that his income was for personal services performed without the United States during the taxable period. Although the majority opinion comments on the amount of time spent within the United States and observes:

> * * * We believe that Congress was not concerned with the question where a taxpayer had his permanent residence, but rather intended the act to apply to any American citizen actually outside of the United States for more than six months during the taxable year, engaged in the promotion of American foreign trade. * * *

We find ourselves in accord with the minority opinion of Judge Major who, in supporting the view of the Board, states that the reasons given by the Board for its decision are "of such a convincing character as to justify their inclusion" in his opinion.

In *Estate of W. M. L. Fiske,* 44 B.T.A. 227, the Board said:

> * * * The use of the words 'bona fide nonresident' instead of a straightforward statement that

mere physical presence in or absence from the United States would be determinative, is indication enough that Congress did not mean the exemption to depend upon mere physical presence in or absence from the United States during six months of the year.

The Bureau rulings are neither clear nor controlling on the question of what was meant by 'bona fide nonresident'. The exemption has been held applicable in the rulings, provided that the citizen was merely absent from the United States for more than six months during a taxable year, but it is quite another thing to say that it does not apply unless the person has been absent from the United States for more than six months during a taxable year. Physical absence from the United States for the prescribed time would be a prerequisite in the case of a person who had no actual residence outside of the United States. However, a citizen who had an actual bona fide residence outside of the United States and no residence within the United States, has been held entitled to the exemption even though he was not physically absent from the United States for more than six months during the taxable year. (Carstairs v. United States (Dist. Ct., E. Dist., Pa. 1936, not officially reported).) While decisions relating to the words 'residence' and 'non residence', as used in other statutes are not particularly helpful, they do indicate that the test of mere physical presense or absence is not determinative. Cf. *Hall v. Godchaux,* 149 La. 733; 90 So. 145. *In re Conis,* 35 Fed. (2d) 960; *United States v. Dick,* 291 Fed. 420; *United States v. Rockteschell,* 208 Fed. 530; *United States v.*

> *Jorgenson,* 241 Fed. 412. The above cases, as well as many others, are authority for the proposition that a person may be an actual bona fide resident of a place and yet be absent from that place for one reason or another.
>
> * * * * * * *
>
> Thus, it seems proper to conclude that the question of whether the decedent was a nonresident depends not merely upon the period of time he spent in the United States, but depends also upon the purpose of his visit, his intentions, and surrounding facts and circumstances. *Carstairs v. United States, supra.*

Also cf. *District of Columbia v. Murphy,* 314 U.S. 411.

The legislative history of section 116(a) as set forth in the Board's opinion is a factor in the decision there reached but we do have further light on the intent and understanding of Congress as to that section, in the Senate Finance Committee Report No. 1631, 77th Congress, 2nd Session, relating to the repeal of the section as proposed by the House Bill. The report stated:

> In lieu of the repeal of this section, your committee recommends that subsection (a) be amended so as to change the test there provided to one of residence in a foreign country or countries during the entire taxable year. In the application of such provisions, the tests as to whether a taxpayer is a resident of a foreign country or countries will be those generally applicable in ascertaining whether an alien is a resident of the United States. Vacation or business trips to the United States during the taxable year

> will not necessarily deprive a taxpayer, otherwise qualified, of the exemption provided by this section.

Hence, Congress intended that the same standards governing the determination of the residence of aliens should apply to nonresidents as prescribed in section 116(a). Obviously following this indication of legislative intent, the Commissioner, in section 29.116-1, Regulations 111, provided as follows:

> * * * Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

Section 29.211-2, stating in general terms the requirements for establishing the residence of an alien, provides as follows:

> An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the in-

> come tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

The words of definition and description above set forth are precisely applicable to the facts in the case at bar. We need not repeat them. They all point conclusively to the facts that the petitioner, many years ago, had established his bona fide residence in Mexico; that he maintained it there, up to and including the taxable year, and that he intends to continue it as long as his business requires. As stated in the Senate Finance Committee Report, "vacations or business trips to the United States during the taxable year will not necessarily deprive a taxpayer,

otherwise qualified, of the exemption." The adventitious circumstance of ill health consequent upon continued residence in the tropics is no less a reason for modifying the rule requiring an entire year's nonresidence, than vacations or business trips. By invoking the arithmetical percentage which the respondent seeks, a single day's absence from the place of the taxpayer's "nonresidence" would defeat the exclusion under the later act. This result, of course, would be absurd.

What we have said concerning the petitioner applies equally well to his wife. Incidentally, we suggest this interesting question: Assuming that the petitioner had been physically present in Mexico for more than 183 days of the taxable year and that his wife's ill health had required her to undergo treatment or hospitalization in the United States for more than 183 days thereof, would the respondent's theory deprive her of the exclusion granted by the statute? It would seem to do so. The manifest unreasonableness of such a result is collaterally persuasive that our conclusion is sound—it certainly is just.

We adhere to our position set forth in *Estate of W. M. L. Fiske, supra,* and hold that the petitioners are entitled to the exclusion provided in section 116(a) of the Revenue Act of 1938.

Reviewed by the Court.

(Seal of the Tax Court of the United States)

Decision will be entered under Rule 50.

CERTIFICATE OF COUNSEL.

I, Nathan Moran, attorney for the petitioners in the foregoing petition for a writ of certiorari, do hereby certify that said petition is not interposed for delay and that in my judgment it is well founded.

Dated, San Francisco, California,
November 11, 1946.

NATHAN MORAN,
Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 699

J. W. SWENT AND URSULA L. SWENT, HUSBAND AND WIFE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 15–23) is reported in 5 T. C. 33. The opinion of the Circuit Court of Appeals (R. 44–50) is reported in 155 F. 2d 513.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 8, 1946. (R. 50.) Rehearing was denied on June 18, 1946. (R. 63.) Time within which to file petition for certiorari was extended to and including November 16, 1946. (R. 64.) Petition for a writ of certiorari was

filed on November 16, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Were the taxpayers bona fide nonresidents of the United States "for more than six months during the taxable year" 1940 and entitled under Section 116 (a) of the Internal Revenue Code to an exemption for salary received during that year?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 116. EXCLUSIONS FROM GROSS INCOME
>
> In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:
>
> (a) *Earned Income from Sources Without United States.*—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to

or chargeable against amounts excluded from gross income under this subsection.

* * * * *

(26 U. S. C. 1940 ed., Sec. 116.)

STATEMENT

The facts as found by the Tax Court were as follows:

The taxpayers are husband and wife, native citizens of the United States, and were born in the State of California. They filed their separate income tax returns for the taxable year 1940, on the community property basis, with the Collector of Internal Revenue at Baltimore, Maryland. Their address as stated in their returns was Tayoltita, Durango, Mexico. Prior to 1935 the taxpayers filed their returns with the Sorting Section, Washington, D. C., and therein designated the same address. (R. 16.)

The husband, James W. Swent, first went to Mexico in September 1915, and was employed as an engineer. He married his present wife in Mexico where they remained. In March 1918, he was employed as a geologist by the San Luis Mining Company, a company engaged in mining gold and silver, and moved to Tayoltita. He became assistant manager of the company and about 1920 became the manager, a position which he has held ever since. He and his family have resided in Tayoltita since 1918. (R. 16.)

Tayoltita is a primitive mining town with about 1,500 inhabitants. It has no hotels or residences suitable or available for rent. The taxpayers and their family lived in an adobe house belonging to the company. (R. 16.)

Both taxpayers have suffered from the climatic conditions in Tayoltita. The husband had low blood pressure and his wife was anemic. Practically all of their visits to the United States in recent years have been on account of their health. (R. 16–17.)

The Mexican Government requires the registration of its residents as a prerequisite to their entering a gainful occupation. In so registering, the husband declared himself to be a resident of Tayoltita, Durango. His passports to the United States also stated that his place of residence was that village. He gave his address in the United States as 485 California Street, San Francisco, a business office. (R. 17.)

The taxpayers have two sons, age 27 and 22. Both were born in Oakland, California. They were sent to the United States for preparatory school and college training. The older son is now in the United States Navy. (R. 16.)

In 1940 the husband received an annual salary of $25,000 from the San Luis Company. Approximately one-half of this amount was regularly placed to his credit on the company's books in Mexico and the other half was deposited to his

credit in a San Francisco bank. He drew from his account in Mexico as he needed funds. During 1940 his salary from the San Luis Company was continued undiminished for any deduction for time spent out of Mexico. (R. 17.)

During the tax year 1940 the petitioners each spent a total of 241 days, comprising four visits, in the United States. Mrs. Swent always accompanied her husband on his trips to this country. In each of the years 1939, 1942, and 1943 they were in the United States over six months. While in San Francisco, Mr. Swent rented a furnished apartment, on a month-to-month basis, in an apartment house at 2222 Hyde Street. On his various trips he did not occupy the same apartment. The apartment was also used as headquarters for the taxpayers' sons while attending school in California. (R. 17.)

In 1940 Mr. Swent served as a consultant in litigation involving apex rights on a mine in Idaho. Intermittently he devoted several months during the period of a year and a half to such work, for which he received a fee of $10,000 in that year. He also was employed for about six months in 1940 as an expert in a depletion case in New Mexico. He received $4,000 for such services. He included both sums in his income tax return for 1940. The San Luis Company had no connection with either employment. (R. 17–18.)

The domicile of origin and the last domicile of

each of taxpayers prior to their going to Mexico was the State of California, and the community property law of the State of Durango, Republic of Mexico, in which the taxpayers have resided, is substantially the same as the community property law of the State of California. (R. 18.)

The Civil Code of California, Section 156, provides that the husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto. (R. 18.)

Mr. Swent is still manager of the San Luis Company and expects to continue his activities as such. He intends to retain his residence in Tayoltita. He is also president of a manganese company which has just completed a mill in Lower California. He is a director of the International Bank in Mexico City. (R. 18.)

The $25,000 salary received by Mr. Swent from the San Luis Company in 1940 was earned income from a source without the United States and would have constituted earned income as defined in Section 25 (a), Internal Revenue Code, if it had been received from a source within the United States. (R. 18.)

The Tax Court concluded that the taxpayers were bona fide nonresidents of the United States during the year 1940 (R. 18) and that the salary received by them was exempt from the federal income tax by virtue of the provisions of Section 116 (a) of the Internal Revenue Code. Decision

was entered for the taxpayers. (R. 23–24.) The Circuit Court of Appeals reversed.

ARGUMENT

This case presents no conflict of decisions. It is in complete accord with the only other circuit court of appeals decision on the question. It was correctly decided below and calls for no further review. The question is a narrow one and applicable to very few taxpayers. Moreover, the statute has been amended so that the question is not one of present importance.

Section 116 (a), here involved, exempts income from taxation where it has been earned from sources without the United States by one who is "a bona fide nonresident of the United States for more than six months during the taxable year." Thus, the statute establishes an arbitrary period of six months as a minimum requirement of nonresidence. The undisputed findings in this case show that each of the taxpayers was present 241 days in the United States during the taxable year. (R. 17.) The consistent administrative interpretation of the statute and its legislative history, discussed in the opinion below at R. 47–48, make clear that actual presence in the United States for more than six months during the taxable year is sufficient, as a matter of law, to deprive a taxpayer of the exemption. The only other decision by a circuit court of appeals on this issue is squarely in accord. In *Commissioner*

v. *Fiske's Estate,* 128 F. 2d 487, 490 (C. C. A. 7), certiorari denied, 317 U. S. 635, the court approved the administrative construction that the statute applies only to a citizen who was "actually outside of the United States for more than six months during the taxable year."

This case merely involves the construction of statutory language from which the Tax Court had drawn the generalizing principle that a taxpayer may be present within the United States for more than six months during the taxable year and yet qualify for the statutory exemption. The reversal of the Tax Court in this respect represents no departure from *Dobson* v. *Commissioner,* 320 U. S. 489, on which petitioner so strongly rests this petition.

There was no need to resolve disputed questions of fact nor to draw inferences of fact from basic findings. As in *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, and *Commissioner* v. *Wilcox,* 327 U. S. 404, the Tax Court's determination of the meaning of statutory words was here properly re-examined as a matter of law. Particularly is it important that there be such review where the Tax Court overturns an established administrative interpretation of the statute. See *Commissioner* v. *Scottish American Co.,* 323 U. S. 119, 123.

The statute which governs the case was amended by Section 148 of the Revenue Act of 1942, c.

619, 56 Stat. 798, and now grants the exemption only to one who "is a bona fide *resident* of a foreign country or countries during the *entire* taxable year." [Italics supplied.] The petitioner does not refer to any pending cases involving other taxpayers for years prior to 1942 and we are aware of none in which this question is presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1946.

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